

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WELBORN FREEMAN,  
Plaintiff,  
v.  
UNITED STATES, et al.,  
Defendants.

Case No. [13-cv-02421-VC](#)

**ORDER GRANTING MOTION TO  
DISMISS WITH PREJUDICE**

Re: Dkt. No. 73

Welborn Freeman has sued the United States and various medical providers for harm he suffered in connection with his heart surgery at the San Francisco VA Medical Center. He has filed a second amended complaint after Judge Orrick, who was previously assigned to the case, dismissed the first amended complaint.

The defendants concede that Freeman should be allowed to pursue his negligence and medical malpractice claims against the United States. However, they move to dismiss the negligence and malpractice claims against the individual defendants and to dismiss the remainder of Freeman's claims against all defendants. The motion is granted. The dismissal is with prejudice, which means that Freeman is not allowed to attempt to amend his complaint again to bolster these dismissed claims. Freeman's motion to file a surreply is denied, because the motion provides no indication that it would further assist the Court in adjudicating the motion to dismiss.

The reasons for the dismissal are as follows:

1. Freeman continues to pursue claims for negligence and malpractice against the individual defendants. However, Judge Orrick, in a prior order, dismissed these claims with prejudice. *See* Docket No. 67.

2. Freeman also continues to pursue claims for intentional infliction of emotional distress, which Judge Orrick previously dismissed with leave to amend. But the second amended

1 complaint does not satisfy the standards Judge Orrick set forth for pleading a claim for intentional  
2 infliction of emotional distress.

3 3. Freeman also continues to pursue his claim for racial discrimination in violation of  
4 California's Unruh Act, which Judge Orrick also had dismissed with leave to amend. But the  
5 second amended complaint does not add any factual allegations that would give rise to an Unruh  
6 Act claim based on the standards set forth by Judge Orrick.

7 4. Freeman also continues to pursue his *Bivens* claims against the individual defendants  
8 for violating his First and Fifth Amendment rights. However, Judge Orrick set forth the standards  
9 for stating a First Amendment claim in his prior order, and the second amended complaint does  
10 not satisfy those standards. And, although the second amended complaint mentions the Fifth  
11 Amendment, it does not include allegations explaining how anyone violated the Fifth Amendment  
12 (at least beyond the allegations pertinent to the claim for intentional infliction of emotional  
13 distress, which, as discussed above, fail to state a claim).

14 5. Freeman has added a claim for violation of California's Bane Act, but as discussed  
15 above, he has not successfully alleged that any of the defendants violated his constitutional rights.  
16 Similarly, he has not successfully alleged that any of the defendants interfered with his exercise of  
17 constitutional rights through threats or coercion.

18 Based on the number of attempts Freeman has made to assert claims other than negligence  
19 or medical malpractice and the detail he has already included in his complaints, it is clear that any  
20 further attempt to amend the complaint would be futile. Therefore, all of Freeman's claims, except  
21 for the negligence and malpractice claims against the United States, are dismissed with prejudice.  
22 This means that if Freeman wishes to pursue this lawsuit, he must pursue only the negligence and  
23 malpractice claims against the United States.

24 **IT IS SO ORDERED.**

25 Dated: June 24, 2014



26  
27 VINCE CHHABRIA  
United States District Judge

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 6/24/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Welborn Freeman  
276 Lee Street #101  
Oakland, CA 94610

Dated: 6/26/2014

Richard W. Wieking  
Clerk, United States District Court



By: \_\_\_\_\_  
Kristen Melen, Deputy Clerk to the  
Honorable VINCE CHHABRIA

United States District Court  
Northern District of California